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BEFORE THE DOCKET FILE COPY ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
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Amendment of the Commission's Regulatory	)	IB Docket No. 95-41
Policies Governing Domestic Fixed Satellites	)	
And Separate International Satellite Systems	)	

To: The Commission

PETITION FOR RECONSIDERATION OF
COLUMBIA COMMUNICATIONS CORPORATION

Raul R. Rodriguez
Stephen D. Baruch
David S. Keir

Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

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Its Attorneys

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Summary

Columbia was an early proponent of the Commission's initiative to remove the artificial distinction between domestic and international satellite service. Nonetheless, Columbia is compelled to seek reconsideration of the Report & Order adopting this important reform because the Commission erred in deciding to apply the strict domsat financial standard to all satellite applications, abandoning the two-stage approach that has fostered the development of competitive international satellite service.

First, the Commission's decision failed to give due consideration to the continuing distinctions between satellite services offered from domestic and international orbital locations, which justify continued use of two-stage financial showings. Mere removal of regulatory distinctions does not place all applicants on equal footing; it continues to be more difficult for satellite operators to project and to rely on revenues derived from international routes. This is so for a variety of reasons, including the greater competition from foreign entities to secure international orbital slots; the need for both technical and economic consultation with INTELSAT; the requirement to coordinate use through the ITU with foreign administrations; and the uncertainty of obtaining authority to operate in the entire coverage area of a satellite. Each of these factors makes implementing a primarily international service far more complex and problematic than implementing a primarily domestic service.

Second, the Commission was simply incorrect in implying that its experience with the current, more flexible two-stage showing for international satellite

systems has been negative. The reality is that the issuance of conditional authorizations to separate systems applicants has been a dramatic success, and has resulted in the introduction of service by three competitive international service providers. Indeed, although the Commission cited several cases where *domestic* authorizations were declared null and void for failure to finalize financing or meet implementation milestones, it did not cite any similar instances where an international authorization was revoked. On the other hand, many corporations issued unconditional licenses based on a "full" financial showing have failed to commence service.

Third, the Commission failed to consider using alternative processing mechanisms that could better effectuate its goals of implementing service quickly and promoting the widest range of satellite service offerings from the maximum number of competitors. In view of the differences between CONUS and ocean orbital locations, the Commission erred in placing the onus on each applicant to meet a one-size-fits-all financial standard in its initial application. By simply granting applicants in uncongested areas of the orbital arc a conditional authorization, the Commission can remove the uncertainties of initial Commission review and the international coordination process as impediments to potential investment, and provide applicants with a real opportunity to obtain full financing and to offer new service to the public.

With respect to applications that are currently on file, which have been made part of a single processing group as a result of the Commission's Report & Order, Columbia is not aware that any of the applications seeking to provide service outside the domestic orbital arc conflict with each other. Accordingly, the Commission should announce that all applications in the current processing group for uncongested areas will be processed under the rules in effect when they were submitted — there being no reason to apply the revised financial standard to winnow the pool of applicants. Use of the single stage standard would arbitrarily preclude an international applicant from proceeding when no other proposal for service is before the Commission.

Finally, in the alternative, the Commission should at least clarify its instruction that requests for waiver of the one-step requirement "include specific information regarding attempts to obtain adequate financing and an explanation as to why such financing could not be obtained." The Commission should stipulate that applicants seeking to make their financial showing in two steps may simply explain why the uncertainties of launching an international satellite preclude a full financial demonstration prior to the grant of a conditional authorization and the completion of INTELSAT consultation. Applicants should not be required, in effect, to solicit rejection from multiple potential financing sources in the cause of documenting "attempts to obtain adequate financing." Instead, the focus should be on the "explanation . . . why" financing is unavailable, *e.g.*, that market realities require elimination of some of the significant uncertainties in the application process before a proposal can reasonably be presented to investors or financial institutions. Any other construction would absurdly force potential system operators to waste time — and, more significantly, credibility with potential financiers — to prove a negative.

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PETITION FOR RECONSIDERATION OF COLUMBIA COMMUNICATIONS CORPORATION

Columbia Communications Corporation ("Columbia"), by counsel and pursuant to Section 1.429 of the Commission's rules (47 C.F.R. § 1.429 (1994)), seeks reconsideration of the Commission's Report and Order in the above-captioned proceeding, in which the Commission removed prior regulatory restrictions and established a new policy permitting U.S.-licensed satellite systems to offer both domestic and international services.[1] Columbia agrees with this policy direction, but disagrees with one significant determination made by the Commission in establishing the new policy — the adoption of the former domestic satellite financial standard as the standard

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[1] See Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, FCC 96-14, slip op. (released January 22, 1996) ("Report & Order"). Notice of this action was published in the Federal Register on March 12, 1996. See 61 Fed. Reg. 9946.

for all satellite applications, including those outside the domestic portion of the geostationary orbital arc that must rely on transoceanic and other international services to achieve commercial success. An inflexible standard for all satellite applicants is not in the public interest.

I. Introduction

Prior to 1985, the Commission did not strictly enforce its financial qualification standard for satellite applicants, and had issued several conditional authorizations to applicants that demonstrated that they were otherwise qualified to construct, launch and operate a satellite. However, in July 1985, responding to the large number of domestic fixed-satellite applicants in the November 7, 1983 processing group, as well as the failure of several conditionally-licensed companies to make full financial showings and proceed with their proposals, the Commission adopted what has been known as the domestic satellite ("domsat") financial standard.[2/] This standard required each applicant to demonstrate its ability, based on current assets and operating income, to meet the costs of constructing and launching its proposed system and operating it for one year.[3/]

[2/] See Licensing Space Stations in the Domestic Fixed-Satellite Service, 58 R.R. 2d 1267 (1985).

[3/] See id. at 1272-73.

On the very same day that it strengthened its application of the domsat standard, the Commission adopted an alternative approach to processing applications for international orbital locations. In doing so, the Commission recognized that the special obligations of prospective international "separate systems" to undertake consultations with the International Telecommunications Satellite Organization ("INTELSAT"):

> [T]he fact that the applicant must undergo the INTELSAT consultation process and the resulting continued uncertain status of the application pending this process means the applicant is unlikely to receive from any banking or financial institution irrevocable financial commitments until [the] consultation process is completed. . . . [w]e believe that issuance of some kind of preliminary authorization is necessary for an applicant to obtain foreign authorization of its proposed system — a condition precedent for U.S. initiation of the Article XIV(d) consultation process.[4/]

The Commission thus adopted a two-stage financial showing for international applicants to allow them to remove as many uncertainties as possible before being required to satisfy the full terms of the domsat standard. The initial conditional authorization issued — based on the applicant's technical and legal showing, plus its identification of estimated system costs, operating expenses, and *potential* sources of financing — would remove any uncertainty concerning the applicant's non-financial qualifications, and would provide it with the color of authority to undertake and complete international consultation and coordination activities.

[4/] See Establishment of Satellite Systems Providing International Communications, 101 F.C.C. 2d 1046, 1164-65 (1985) ("Separate Systems Order").

In the Report & Order in this proceeding, the Commission adopted the proposal advanced in its initial Notice to employ only the domsat standard for all future U.S. satellite applications, thereby abandoning the bifurcated approach intended to aid applicants seeking to provide international service. This decision failed to give due consideration to the continuing distinctions between satellite services offered from domestic and international orbital locations or other significant reasons advanced by commenters in the proceeding for continuing to allow two-stage showings. Specifically, Columbia believes that the Commission's initial decision is deficient in at least three key respects. First, the Commission failed to address in any meaningful way the inherent difficulties in offering international satellite service in considering whether it was appropriate to require all satellite applicants to make a full financial showing in their initial application. Second, the Commission was simply incorrect in implying that its experience with the current, more flexible two-stage showing for international satellite systems has been negative. Third, the Commission failed to consider using alternative processing mechanisms that could better effectuate its goals of implementing service quickly and promoting the widest range of satellite service offerings from the maximum number of competitors.

II. The Commission Did Not Adequately Address The Inherent Differences Between Domestic And International Satellite Services In Considering Whether It Was Appropriate To Apply The One Step Domestic Financial Qualification Standard To All Satellite Applicants.

In the Notice initiating this proceeding, the Commission proposed to adopt a unified financial qualification standard for all satellite applicants based on the premise that the abandonment of any distinction between domestic and international satellite services would permit "all applicants . . . to obtain financial commitments based on the justified expectation of revenues from the provision of domestic service."[5/] As Columbia and several other commenters in the rulemaking pointed out, however, the Commission's initial supposition was at odds with reality.[6/] The mere consolidation of U.S. regulatory treatment of domestic and international satellite systems will not change the facts concerning operation of international satellite systems. Because each space station is licensed to a particular orbital location with inherent coverage limitations, the actual domestic service that can be provided by satellites located over the Atlantic and Pacific Oceans is constrained. Ocean region satellites, which offer only limited coverage of the continental United States, are best-suited to the provision of transoceanic, international

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5/ Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 10 FCC Rcd 7789, 7795 (¶ 29) (1995) ("Notice").

6/ See, *e.g.*, Columbia Comments at 6-7.

service, notwithstanding the fact that they may have the capability to provide some domestic services to particular geographic areas or market niches.[7/]

Based on this reality, applicants for ocean region orbital locations must necessarily rely on the revenue to be generated from international service offerings because revenue from limited domestic offerings alone would be insufficient to attract adequate financial backing. As the Commission determined in establishing the original two-step financial showing, it is more difficult for satellite operators to project and to rely on revenues derived from international routes.[8/] This is so for a variety of reasons, including the greater competition from foreign entities to secure international orbital slots; the need for both technical and economic consultation with INTELSAT; the requirement to coordinate use through the International Telecommunication Union ("ITU") with foreign administrations; and the uncertainty of obtaining authority to operate throughout the entire coverage area of a satellite. Each of these factors makes implementing a primarily international service far more complex and problematic than implementing a primarily domestic service (*i.e.*, from a location that provides fifty-state coverage of the United States).

7/ See Columbia Comments at 6-7.

8/ See Separate Systems Order, 101 F.C.C. 2d at 1165 ("[T]he applicant will have difficulty in locating customers for its proposed capacity and/or services absent both a construction permit and successful completion of the Article XIV(d) process.")

As an initial matter, while the competition for orbital slots with CONUS coverage is limited primarily to North American companies, a far greater number of entities — including INTELSAT, as well as foreign corporations and foreign governments — are potential applicants for slots in the ocean region portions of the orbital arc. In this environment, it is extremely important for U.S. companies to initiate at the earliest possible date the process of international filing for a particular orbital location. Failure of the U.S. government promptly to register requests for slots with the ITU in response to industry demand will prejudice U.S. interests generally, not just those of the particular applicant.

Under the single stage financial standard that the Commission adopted in its Report & Order, U.S. companies without the immediate ability to finance a new satellite based on their own resources would be severely handicapped in their ability to make timely applications to construct, launch and operate new facilities. Delays in submitting an application occasioned by a need to secure firm financing might therefore undermine a project's viability because foreign competitors would be unencumbered by the impediment of a full financing requirement, and would thus be able to gain priority over U.S. businesses.[9/]

[9/] As Hughes commented in the rulemaking proceeding, "as the orbital arc increasingly becomes occupied by foreign satellites, it is critical that the Commission adopt a policy that will not delay or prevent U.S. FCC licensees that are prepared to compete from

Second, in addition to competing with foreign entities to gain access to particular orbital slots, U.S. applicants are also faced with extensive and complicated consultation and coordination requirements due to adjacent proposals. Despite steps toward liberalization of the INTELSAT Article XIV(d) process, there remain greater impediments to international satellite operations than those that are primarily domestic in scope. Systems designed to provide primarily international service must consult not only with INTELSAT and but must also coordinate their use through the ITU with a significantly larger number of foreign administrations than are generally affected by a domestic satellite applicant because transoceanic operations necessarily have impact over the territories of a larger number foreign countries. Given the greater number of participants, these negotiations are necessarily more complex and protracted than they are for domestic arc systems.

Finally, even after the consultation and coordination processes have been successfully concluded — and in sharp contrast to the circumstances for domestic systems — there are no guarantees that operators will be able to gain access to markets that lie within their coverage areas. Each operator must gain access to earth station

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occupying those locations and frequencies." Hughes Comments at 17. Although Hughes saw this as a rationale for imposing the domsat financial standard on all satellite applicants, it is a better argument for a flexible standard that allows the maximum number of U.S. satellite proposals to proceed.

facilities in each country where it hopes to provide service, a process which is often complicated and frequently unsuccessful.[10] Indeed, in the course of the rulemaking proceeding, GE American Communications, Inc. — a subsidiary of one of the largest industrial companies in the United States — expressed concern that it would be disadvantaged in entering the market for international services because of the uncertainties of gaining authority to operate in foreign countries.[11] If such obstacles are daunting for a company with the reputation and resources of General Electric behind it, then it goes without saying that they pose difficulties for smaller companies that are just establishing themselves in the marketplace.

Because satellite design may change significantly during the course of the coordination process, business plans cannot realistically be finalized until this process is complete. This factor, in turn, makes it virtually impossible for companies not relying on internal funds to finalize their financing until coordination is complete. Unfortunately, coordination cannot begin until the prospective system operator has some form of governmental authority to proceed with its system. Thus, the one-step standard precludes an applicant from receiving any form of authorization until a full financial showing is made, thereby preventing smaller applicants from putting together a proposal that is

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[10] See Columbia Comments at 7; Orion Comments at 6.

[11] See GE Americom Reply Comments at 2.

actually attractive to potential investors. In effect, the inflexibility of the Commission standard would cede the satellite market to only the very largest U.S. corporations and to foreign companies not hampered by such an artificial requirement.

Based on these factors, Columbia and others argued that it was appropriate to continue to permit at least some, if not all,[12/] satellite system applicants to rely on a two stage financial qualification standard due to the greater uncertainties that exist in establishing systems primarily for international use. Because those applicants seeking ocean region orbital slots will still be compelled to rely on their ability to attract international traffic, the uncertainties of serving the international market that originally prompted the adoption of the two-stage financial showing continue to support its retention.

In the Report & Order, the Commission merely recited these considerable, and well documented concerns,[13/] but did not address them in any meaningful way. Instead, it simply expressed that it was "sympathetic" with difficulties faced by "small companies," declining to take into account any of the concerns raised in establishing its

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12/ See, *e.g.*, Orion Comments at 9 (proposing that all U.S. satellite applicants be permitted to make a two-stage financial showing).

13/ See Report & Order, FCC 96-14, slip op. at 13 (¶¶ 38-39).

new policy.[14] The Commission offered no explanation why it was declining to permit some flexibility in the application of its financial standard, except its statement that its "repeated experience is that applicants without ready access to . . . financing" are "often unsuccessful."[15]

As detailed below, however, the Commission's decision to reject without discussion the real concerns of the separate systems industry is premised on a determination that is at odds with the Commission's own experience with international satellite applicants. In the absence of any analysis or discussion by the Commission, this would not appear to offer sufficient reason for abandoning what has actually been a very successful regulatory policy.

III. The Commission Was Incorrect To Imply That Its Experience With The Two-Stage Separate Systems Financial Showing Has Been Negative.

In the Report & Order, the lone justification provided by the Commission for rejecting the arguments in favor of a two-step financial showing for at least some satellite applicants was "repeated experience" with applicants that had failed to obtain financing, coupled with its "anticipation" of "increased demand for a wider range of

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[14] See id. at 14 (¶ 40).

[15] Id.

orbital locations."[16] While the Commission is correct to be concerned that it not establish a system that can be abused by speculators intent on "warehousing" orbital locations, the reality of the Commission's experience with the two-stage separate systems standard is that it has been highly successful, resulting in the establishment of three operating systems that provide much-needed competitive satellite services to a variety users.[17]

Notably, the Commission's order makes no reference to any instance where a conditionally authorized separate system operator failed to make its final financial showing and commence operations. Instead, all of the cited instances where applicants ultimately failed to construct their systems — and authorizations were declared null and void — are from the domestic geostationary fixed-satellite or other services.[18] The undesirable practice of spectrum warehousing simply has not been a problem in the international separate systems industry, and three start-up companies have successfully navigated through difficult domestic and international regulatory processes to become

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[16] Id.

[17] Now that privately-held satellite companies have been a reality for a period of some years, and there are multiple providers of service, there is less reason to be concerned that usable orbital slots will remain fallow for extended periods. The satellite industry is now established, and it is likely that any available orbital locations will readily be put to use -- i.e., there is no incentive for speculators to secure spectrum and wait for uncertain demand to materialize.

[18] See Report & Order, FCC 96-14, slip op. at 14 n.57.

successful satellite operators. Nowhere does the Commission's decision acknowledge this fact, let alone take it into account in formulating its revised policy.

Conversely, *the existing domsat standard has not been consistently successful* in identifying applicants that ultimately construct, launch and operate satellite systems. Any entity, regardless of its size, reputation or financial wherewithal, can allow assigned resources to go unused. Indeed, the first processing group in which the Commission strictly applied its domsat financial standard included several large U.S. corporations that were awarded orbital locations (in preference to smaller companies, including Columbia[19/]) but which never implemented their proposals. Western Union Telegraph Company ("Western Union"), to cite one prominent example, was among the applicants found financially qualified in 1985 based solely on its current assets[20/] — despite the fact that it was teetering on the verge of bankruptcy at the time. Predictably, Westar VIII and XI, which Western Union was authorized to build in that round, were never built — and the company ultimately transferred its prior authorizations to Hughes in 1988.[21/]

19/ See Columbia Communications Corp., 103 F.C.C. 2d 618 (1985).

20/ See Western Union Telegraph Co., 103 F.C.C. 2d 892, 895 (1985) (finding the applicant qualified to construct two of the four satellites it requested).

21/ See Western Union Corporation, Assignor, and Hughes Communications Galaxy, Inc., Assignee, 3 FCC Rcd 6792 (Com. Car. Bur. 1988). See also American Tel. & Tel. Co.

Finally, it is worth noting that none of the three authorized U.S. international separate systems was a well-established company at the time it sought its initial license. Instead, all three are entrepreneurial, risk taking companies that aspired to inject new competition and tailored service options into the satellite service market — and all three have achieved a large measure of success in this endeavor. The flexibility of the two-stage financial standard has thus been beneficial not only to applicants themselves but, in even more dramatic fashion, to the users of international satellite services. In light of this doubly successful history, and because the rationale underlying the adoption of the bifurcated showing remains valid, as shown above, there was no basis for the Commission to abandon it summarily as it did in adopting the Report & Order.

IV. Alternative Processing Mechanisms Can Better Effectuate The Commission's Goals Of Preventing Service Delays And Ensuring That "The U.S. Public Has Available To It The Widest Range Of Satellite Service Offerings From The Greatest Number of Competitors Possible."

Given the success of the separate systems policy in launching new companies to provide competition and new services in the international satellite marketplace, the Commission's unsupported decision to abandon it in favor of a more

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and Ford Aerospace Satellite Services Corp., 2 FCC Rcd 4431, 4435 (1987) (declaring null and void the three authorizations granted to Ford in 1985 and accordingly denying an application to transfer them to AT&T).

rigid qualification standard was in error. This aspect of the Report & Order is particularly puzzling in light of the Commission's simultaneous declaration that its "primary obligation is to ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible."[22] Unfortunately, the policy adopted by the Commission purportedly to achieve this desired outcome will have exactly the opposite effect — ensuring that only the very largest U.S. corporations will be given the opportunity to pursue satellite ventures.

Although the Commission's revised standard permits applicants to request a waiver,[23] this step does nothing to ameliorate the harsh impact of the decision. In fact, an administrative agency is obligated under most circumstances to consider carefully any well-articulated request for waiver of its rules.[24] Given the circumstances of satellite financing and the Commission's own stated reasons for modifying its policies, the Commission erred in placing the onus upon each satellite applicant to meet a one-size-fits-all financial standard in its initial application.

Considering the Commission's primary concerns of ensuring expeditious service to the public, promoting competition and varied service options, and discouraging

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22/ Report & Order, FCC 96-14, slip op. at 14 (¶ 40).

23/ Id. at 14 (¶ 42).

24/ See, *e.g.*, WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

orbit/spectrum warehousing, there are other significant options that would be more effective in furthering these goals. Specifically, the Commission could much better promote its goal of allowing "the maximum number of qualified applicants to go forward" by continuing to permit the processing of applications on a bifurcated basis when there are no mutually exclusive domestic applications, as detailed below.

In the Report &Order, a principal motivation cited for the change in policy is the Commission's *anticipation* of increased demand for a wide variety of orbital locations.[25/] On the other hand, the chief factor supporting the adoption of a waiver policy is the fact that there is generally less demand for orbital locations "well outside the traditional domestic arc."[26/] With respect to applications that are currently on file, which have been made part of a single processing group as a result of the Commission's Report & Order, Columbia is not aware that any of the applications seeking to provide service outside the domestic orbital arc conflict with each other. The Commission should therefore announce that these applications for uncongested areas will be processed under the rules in effect when they were submitted because there is no reason to apply the revised financial standard to winnow the pool of applicants. Use of the single stage

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25/ Report & Order, FCC 96-14, slip op. at 14 (¶ 41).

26/ Id. at 14 (¶ 42).

standard might arbitrarily preclude an international applicant from proceeding when no other proposal for service is before the Commission.

By simply granting current applicants in uncongested areas of the orbital arc a conditional authorization, the Commission can remove the uncertainties of initial Commission review and the international coordination process as impediments to potential investment, and provide applicants with a real opportunity to obtain full financing and to offer new service to the public.

As noted above, any type of entity can allow assigned resources to go unused, regardless of its size or financial showing. The Commission should not establish a system where large industry players can claim orbital slots simply by submitting their balance sheets to the FCC, preempting these resources from use by less-well-capitalized, but more committed competitors. In order to prevent such conduct, the Commission should limit the number of orbital locations controlled by a single entity to prevent further concentration in the satellite industry, as PanAmSat suggested in its comments in the rulemaking proceeding.[27/]

In addition, to prevent companies from filing strategic applications to preempt competitors in future rounds, the Commission should establish an application

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[27/] See PanAmSat Reply Comments at i (proposing a cap on the number of orbital locations that may be controlled by a single licensee).

processing mechanism whereby a new round is triggered immediately following the completion of processing of the applicants in the preceding round. Without waiting for new applications to be submitted, the FCC could issue an appropriate Public Notice after the conclusion of a processing round (which would, of course, list any applications submitted after the closing of eligibility for the preceding round) soliciting additional applications for filing within a specified time-period (*e.g.*, 60 to 90 days). This method would have the dual benefits of expediting the commencement of new processing rounds, and minimizing the ability of companies to file new applications simply for the purpose of blocking applicants already on file, *e.g.*, by "overfiling" for the same (or nearby) orbital location as another applicant.

Accordingly, those pending proposals submitted in accordance with the two-stage financial showing can and should be granted conditional authorizations upon an FCC determination that they are legally and technically qualified. Once the international coordination process is completed, these applicants should be considered for unconditional authority following submission of a full financial showing. Applications submitted in future processing groups ought to be treated in the same manner to the extent that they do not conflict directly with proposals filed by other applicants.

V. If The Commission Fails To Tailor Appropriately Its Financial Requirements To Market Realities, It Should At Least Clarify The Obligations Of Applicants That Seek Waivers Of The Financial Standard Based On Such Considerations.

In the alternative, if the Commission fails to reevaluate fully the conclusions reached in its Report & Order, it should, at a minimum, clarify its discussion of requests for waiver of the financial standard for purposes of allowing applicants to make a two-step financial showing. In the Report & Order, the Commission stated that such requests "should include specific information regarding attempts to obtain adequate financing and an explanation as to why such financing could not be obtained."[28] The Commission should make clear that applicants may simply explain why the uncertainties of launching an international satellite preclude a full financial demonstration prior to the grant of a conditional authorization and the completion of INTELSAT consultation.

Applicants should not be required, in effect, to solicit rejection from multiple potential financing sources in the cause of documenting "attempts to obtain adequate financing." Instead, the focus should be on the "explanation . . . why" financing is unavailable, *i.e.*, applicants should be able to explain how market realities require that some of the significant uncertainties in the application process be minimized or removed

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[28] Report & Order, FCC 96-14, slip op. at 14 (¶ 42).